

#### **Cancellation of Removal**

2018 Executive Office for Immigration Review JLC Training Program

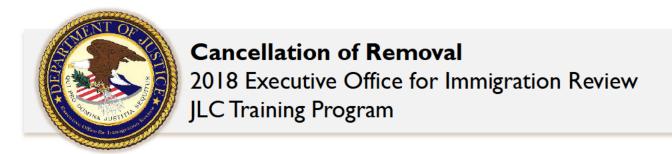
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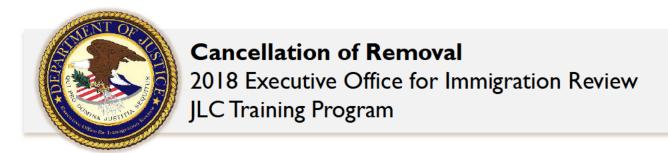
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## Non-LPR Cancellation of Removal

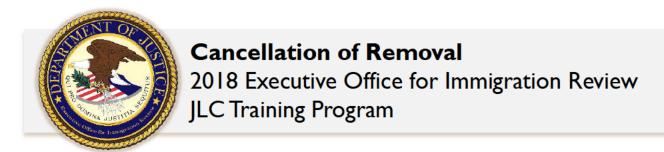
- INA § 240A(b)(1) -



- 10 years of continuous physical presence
  - Military service exception (INA § 240A(d)(3))
- Good moral character during 10-year period
  - Continuing application; no stop-time. Matter of Ortega-Cabrera, 23 I&N Dec. 793 (BIA 2005)

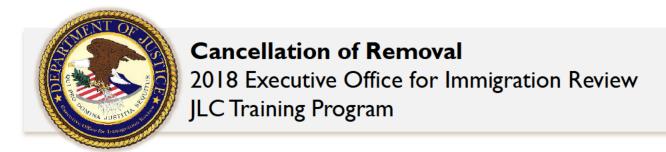


- Not convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3) of the Act.
  - Bar applies even if conviction is not basis for removal charge. Matter of Almanza, 24 I&N Dec. 771 (BIA 2009)
  - Inconclusive record does not meet applicant's burden of proof
  - Offense is "described under" regardless of immigration-related aspects
    of those sections. Matter of Cortez, 25 I&N Dec. 301 (BIA 2010); but
    see Lozano-Arredondo v. Sessions, 866 F.3d 1082 (9th Cir. 2017) (holding
    statutory language "offense under" is ambiguous)
  - CIMT that qualifies for the petty offense exception is not "an offense under" section 212(a)(2)(A)(i)(I) but may be described under section 237(a)(2)(A)(i). Matter of Almanza, supra; Matter of Garcia-Hernandez, 23 I&N Dec. 590 (BIA 2003)



## Exceptional and extremely unusual hardship to a qualifying relative

- USC or LPR spouse, parent, or child
  - INA defines "child" as under 21. See Matter of Isidro, 25 I&N Dec. 829 (BIA 2012) (aging out)
  - includes stepparent and stepchild
- "substantially beyond" (Matter of Monreal, 23 I&N Dec. 56 (BIA 2001))
  - Matter of Andazola, 23 I&N Dec. 319 (BIA 2002)
  - Matter of Recinas, 23 I&N Dec. 467 (BIA 2002)
- Matter of Calderon-Hernandez, 25 I&N Dec. 885 (BIA 2012) (no affidavit required to show child will remain in US with other parent)
- Aggregate analysis, but EEUH to "a" qualifying relative



#### Not ineligible under section 240A(c) of the Act

- Crewmen
- Certain IOI(a)(I5)(J) educational exchange nonimmigrants
- Inadmissible under 212(a)(3) or 237(a)(4)
- Persecutors
- Previous grant of similar relief
- Warrants favorable exercise of discretion

#### LPR Cancellation of Removal

- INA § 240A(a) -

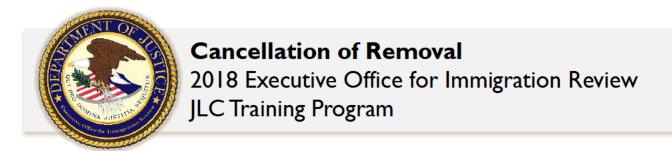


#### 5 years of lawful permanent residence

• LPR status must be lawfully obtained; one who acquired status by fraud or misrepresentation is not "lawfully admitted for permanent residence." *Matter of Koloamatangi*, 23 I&N Dec. 548 (BIA 2003)

## 7 years of continuous residence after admission

- Admission in any status sufficient. Matter of Castillo Angulo, 27 I&N Dec. 194 (BIA 2018)
- Adjustment of status counts as an admission
- Military service exception (INA § 240A(d)(3))



- No aggravated felony conviction
  - Bar applies even if not charged as ground of removal
- Not barred under § 240A(c) of the Act

Warrants favorable exercise of discretion

### Suspension of Deportation

- Former INA § 244 -



Currently available in limited circumstances

Seven-Year Suspension

#### Ten-Year Suspension

- Relief for those convicted of more serious crimes (ex: CIMTs and narcotics)
- When charged with those grounds of deportability. See Matter of Ching, 12 I&N Dec. 710 (BIA 1968)



#### Requirements

- Seven years of continuous physical presence (ten years if deportable under criminal, document fraud, or security related grounds)
- Good moral character during entire period (date of conviction)
- Extreme hardship to alien or USC/LPR spouse, child, or parent (exceptional and extremely unusual hardship if deportable under criminal, document fraud, or security related grounds)
- Not inadmissible under Nazi or genocide grounds
- Warrants favorable exercise of discretion

## NACARA Special Rule Cancellation of Removal

- 8 C.F.R. §§ 1240.60-1240.70 -



- Is an individual described in 8 C.F.R. § 1240.61
- If not removable under § 212(a)(2) or (3), or § 237(a)(2), (3), or (4):
  - 7 years of continuous physical presence
  - Good moral character during 7-year period
  - Extreme hardship to alien or a qualifying relative
    - Rebuttable presumption of extreme hardship. 8 C.F.R. § 1240.64(d))

**Note:** Board has held application is continuing for cpp and gmc, but 8<sup>th</sup> and 9<sup>th</sup> Circuits have disagreed. Compare Matter of Garcia, 24 I&N Dec. 179 (BIA 2007), with Aragon-Salazar v. Holder, 769 F.3d 699 (9th Cir. 2014), and Cuadra v. Gonzales, 417 F.3d 947 (8th Cir. 2005).



#### If removable under those sections, heightened burden:

- Not convicted of an aggravated felony
- 10 years of continuous physical presence following commission of most recent act
- Good moral character during 10-year period
- Exceptional and extremely unusual hardship to alien or qualifying relative

#### Warrants favorable exercise of discretion

# VAWA Cancellation and Suspension

- INA § 240A(b)(2) -
- Former INA § 244(a)(3) -



- Any alien
  - Includes LPRs, see Matter of A-M-, 25 I&N Dec. 66 (BIA 2009)
- Who has been battered or subjected to extreme cruelty, or whose child has been battered or subjected to extreme cruelty
  - See 8 C.F.R. § 204.2(c)(1)(vi)
- By spouse, putative spouse, or parent
- Abuser is or was USC or LPR



#### Requirements

- 3 years of continuous physical presence
  - Exceptions:
    - Stop-time exception
    - Exception for absence connected to battery or extreme cruelty
- Good moral character during 3-year period
  - Exception to IOI(f)
    - · conviction connected to abuse will not bar good moral character
- Not removable under § 212(a)(2) or (3), or § 237(a)(1)(G), (2), (3), or (4)

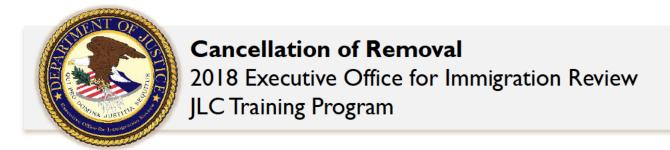


#### No aggravated felony conviction

- Extreme hardship to self, child, or parent
  - 8 C.F.R. § 1240.58
  - No lawful status requirement

#### Merits Favorable Exercise of Discretion

- Matter of M-L-M-A-, 26 I&N Dec. 360 (BIA 2014)
- Matter of A-M-, supra



#### **Special Considerations**

Adjudicator must consider "any credible evidence" relevant

INA § 240A(c) bars do not apply



#### VAWA Suspension of Deportation

is deportable under any law of the United States except section 241(a)(1)(G) and paragraph (2), (3), or (4) of section 241(a); has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application; has been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a United States citizen or lawful permanent resident (or is the parent of a child of a United States citizen or lawful permanent resident and the child has been battered or subjected to extreme cruelty in the United States by such citizen or permanent resident parent); and proves that during all of such time in the United States the alien was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or the alien's parent or child.



#### **Applicable Regulations**

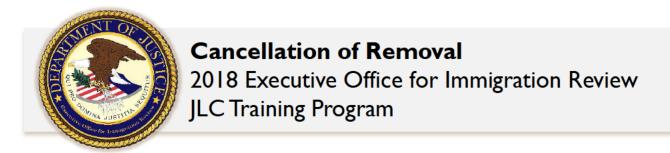
- 8 C.F.R. § 1240.65(d) eligibility provisions for VAWA suspension
- 8 C.F.R. § 1240.58 defines extreme hardship, including special definition for VAWA claims
- 8 C.F.R. § 1240.20(c) explicitly applies extreme hardship factors to VAWA cancellation claims
- 8 C.F.R. § 204.2(c)(1)(vi) defines battery or extreme cruelty

## Breaks in continuous physical presence



#### What is a "Break?"

- Statutory breaks
  - INA § 240A(d)(2): 90-day bar and aggregate 180-day bar
- Departure compelled by threat of proceedings
  - Matter of Romalez, 23 I&N Dec. 423 (BIA 2002)
- Departure after conviction for illegal entry
  - Matter of Velasquez-Cruz, 26 I&N Dec. 458 (BIA 2014)
     (departure after functional equivalent to finding of inadmissibility)



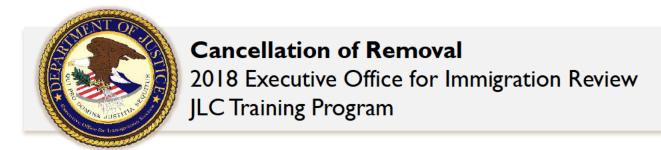
#### Matter of Avilez, 23 I&N Dec. 799 (BIA 2005):

- exclusion at POE
- expedited removal order
- permitted to withdraw application for admission
- any other formal, documented process pursuant to which the alien is determined to be inadmissible



#### What is a "formal, documented process?"

- Voluntary return constitutes break if alien was advised of right to hearing before IJ and affirmatively agreed to depart in lieu of removal proceedings. Matter of Castrejon-Colino, 26 I&N Dec. 667 (BIA 2015)
  - Being fingerprinted and/or photographed is not enough
  - Does not have to occur at or near border



#### What is the effect of a "break?"

- Begin accruing new period of presence after break
  - Different statutory language
  - Break is a temporary "interruptive event" (Matter of Mendoza-Sandino, 22 I&N Dec. 1236 (BIA 2000))

### **Stop-Time Rule**

- INA § 240A(d)(1) -



#### Terminates residence or physical presence when:

- A charging document specifying the date, time, and location of a hearing is served; or
- when the alien commits an offense referred to in § 212(a)(2) that renders the alien inadmissible under section 212(a)(2) or removable under § 237(a)(2) or § 237(a)(4)



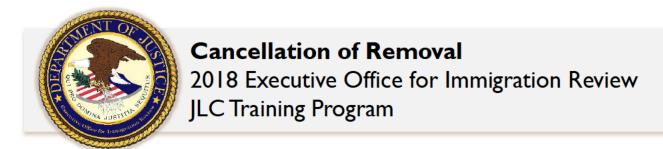
#### **Service of the NTA**

- When the alien is served a notice to appear under § 239(a)
  - Pereira v. Sessions, 138 S. Ct. 2105 (2018)
    - "[a] putative notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings is not a 'notice to appear under [INA § 239(a)],' and so does not trigger the stop-time rule." Pereira v. Sessions, 138 S. Ct. 2105, 2113-14 (quoting INA § 240A(d)(1)); see INA § 239(a)(1)(G)
    - Third Circuit's Approach
      - Service of a Notice of Hearing



#### **Service of the NTA**

- In the proceedings in which the alien applies for cancellation of removal
  - Does NOT include:
    - a charging document served in any prior proceeding. Matter of Cisneros, 23 I&N Dec. 668 (BIA 2004); or
    - a charging document that was served but never filed in Immigration Court to commence removal proceedings. Matter of Ordaz, 26 I&N Dec. 637 (BIA 2015)



#### **Commission of an Offense**

- Offense must be one "referred to in § 212(a)(2)"
  - Matter of Campos-Torres, 22 I&N Dec. 1289 (BIA 2000) (firearms offense)
  - Matter of Garcia, 25 I&N Dec. 332 (BIA 2010) (petty offense exception)
- Commission of offense terminates accrual, regardless of whether offense is basis for charge of removal
  - Matter of Jurado, 24 I&N Dec. 29 (BIA 2006)



#### **Retroactivity of Offenses**

- Circuit split on retroactivity to offense committed prior to IIRIRA
  - Board has held pre-IIRIRA commission of offense triggers stop-time rule. Matter of Robles, 24 I&N Dec. 22 (BIA 2006); Matter of Perez, 22 I&N Dec. 689 (BIA 1999)
    - Ist Circuit agrees
    - 4th, 7th, 9th Circuits stop-time rule not retroactive to pre-IIRIRA conviction if eligible when IIRIRA enacted

### **Annual Cap**

- INA § 240A(d)(1) -
- 8 C.F.R. § 1240.21(c) -



#### **Annual Cap**

- 4,000 grants of non-LPR cancellation of removal or suspension of deportation per fiscal year (except NACARA)
- After cap reached, cannot grant non-LPR cancellation in nondetained case; must reserve decision
- Deny cancellation in discretion if asylum or adjustment is granted

### **QUESTIONS?**

